IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.271 OF 2007
IN
NOTICE OF MOTION NO.4357 OF 2005
IN
S.C. SUIT NO.560 OF 2006

Mohamed Salim Shabir .. Appellant
(Orig. Defendant)
Versus

Bhagwandas Godumal Nagdevani.. Respondent
(Orig. Plaintiff)

Mr.A.Y.Sakhare, learned Counsel i/b. Shri I.S.Yadnar, for the Appellant
Shri Manojkumar Upadhyay i/b. Shri Sushil M. Shukla for the Respondent

CORAM : S.R. SATHE,J.
DATED : 01/11/2007

ORAL ORDER :-

1. The Appellant-original defendant in SC Suit No.560 of 2006 has preferred this appeal against the order passed by the Judge, City Civil Court, Greater Bombay in Notice of Motion No.4357 of 2005 whereby Plaintiff's application for temporary injunction restraining the defendant from encroaching/ trespassing into the suit shop or illegally dispossessing Plaintiff from the said shop or entering upon the suit premises till the disposal of the suit was allowed. For the sake of convenience hereafter the parties shall be referred

to as 'Plaintiff' and 'defendant'.

2. The brief facts giving rise to this appeal are as under :-

One Narayan Godumal Nagdevani, brother of present Plaintiff was the original tenant of suit Shop bearing No.14 or 4 VLT Plot No.43 opposite paradise cinema, L.J. Road, Mahim (West), Mumbai. According to Plaintiff, on 16/12/1996, he applied to Mumbai Municipal corporation who had leased out premises to Narayan Godumal Nagdevani to transfer the tenancy in Plaintiff's name after obtaining NOC from his brother Narayan Godumal Nagdevani. On 26/12/1996, the Bombay Municipal Corporation gave approval for the same and Plaintiff started doing business in the said shop premises. However, in the year 1998, the defendant also submitted an application to Bombay Municipal Corporation seeking transfer of Shop No.4 Plot No.53 opposite paradise cinema in his favour alleging that the said shop has been sold by Narayan Godumal Nagdevani to him by virtue of an agreement dated 21/12/1992. For that purpose, the defendant filed L.C. Suit No.5391 of 1998. In that suit, present Plaintiff and one Chavan made an application to implead them and accordingly, they were impleaded. The said suit was

decided on 25/11/2002 and the Judge, City Civil Court directed the Corporation to consider the application of present defendant for transfer of room No.4, Plot No.53 opposite Paradise Cinema, Mahim and dismissed the suit against defendant Nos.2 and 3 holding that Plaintiff in the said suit i.e. present defendant has no right concerning Shop No.14.

3. It is Plaintiff's case that on 15/10/2005, defendant with some other unidentified persons came to the Plaintiff's shop No.14, and started threatening Plaintiff and his family members. Plaintiff, therefore, filed non-cognizable complaint with Mahim Police Station on 16/10/2005. Plaintiff also alleged that defendants are aided and assisted by the officers of the Mahim Police Station. Apprehending that defendant would encroach in the suit property and Plaintiff would suffer irreparable loss. Plaintiff filed present suit on 21/10/2005 for permanent injunction restraining defendant from entering or trespassing into the suit shop and illegally dispossessing Plaintiff. The Plaintiff also filed Notice of Motion No.4357 of 2005 and prayed for temporary injunction as mentioned above.

4. The defendant appeared and opposed Notice of

Motion and contended that Plaintiffs are not in possession of the suit shop and on the contrary, the said shop is in his possession. He also alleged that there was partnership between Plaintiff's brother Narayan Godumal Nagdevani and defendant and thereafter the original tenant Narayan Godumal Nagdevani assigned the said shop to defendant's brother after accepting the amount of Rs.1,00,000/- on 21/12/1992. The defendant further contended that Plaintiff has unnecessarily created confusion about the number of the suit shop. In fact, there is no dispute about the identification of the property because Plaintiff as well as defendants are claiming right in respect of the Shop which was originally in possession of Narayan Godumal Nagdevani. So, even if it is called Shop No.4 or 14 it would not make any difference.

5. The defendant also denied all other allegations and contended that on the contrary Plaintiff and his persons entered in the shop and took out cash amount and tried to obtain forcible possession and for that purpose he lodged complaint with police and Plaintiff was even arrested. He, therefore, contended that Plaintiff has not made out any prima facie case for granting temporary injunction as prayed.

6. During the pendency of the Notice of Motion the then Judge, City Civil Court, Bombay had initially appointed Court Commissioner to visit the suit site to find out its condition and who is in possession of the same. Accordingly, Commissioner submitted his report on 10/11/2005. However, both the parties submitted that they are in possession of the suit property. Hence, Trial Judge directed the Commissioner to seal the premises.

7. After hearing arguments of both the learned Advocates and considering the documents produced by both the parties the learned Trial Judge came to the conclusion that in previous proceedings present Plaintiff had clearly admitted that larger portion of the suit shop is in actual possession of the present defendant, while the smaller portion is in possession of the plaintiff. So, in view of the said position and finding that Plaintiff was not in exclusive possession of the suit shop on the date of the suit the learned Trial Judge dismissed the Notice of Motion and directed the Court Commissioner to remove the lock and seal of the suit premises and made it clear that parties are free to occupy their respective portion in the suit

premises i.e. larger portion by the defendant.

8. Being aggrieved by the said order whereby the Court observed that both the parties are at liberty to occupy the suit property the defendant has filed the present appeal. In this appeal before me Shri Sakhare, learned Senior Advocate for the defendant has urged two points. Firstly, he submitted that the Plaintiff in his rejoinder has in fact admitted that the defendant is in possession of the suit shop. Besides this, from the Commissioner's report also it is clear that the defendant is in possession. So, according to him, after passing order regarding dismissal of the Notice of Motion it was not proper on the part of the learned Trial Judge to direct that parties are at liberty to occupy the suit premises and the defendants should occupy the larger portion. Secondly, he submitted that the order passed by the learned Trial Judge is not workable and if the said order with regard to permitting the Plaintiff to occupy premises is not set aside, irreparable loss will be caused to the defendant. He, therefore, submitted that the appeal be allowed. As against this, the learned Advocate for the Plaintiff submitted that the learned Trial Judge has wrongly dismissed the Notice of Motion and learned

Trial Judge ought to have granted temporary injunction as prayed.

9. It is not in dispute that suit plot No.53, opposite Paradise Cinema, Mahim, Mumbai is leased out by the Bombay Municipal Corporation. It has come on record that it appears that there are various shops in all 14 in number situated on the said plot. There are no number plates affixed on the said shops. However, Plaintiffs have attached plan to the plaint and the same is not in dispute. It clearly shows that there are 14 shops. The disputed shop is also only one. So, under such circumstances, whether number of the said shop is 4 or 14 is immaterial. We have to proceed by referring the property in question as the suit shop. Another very important factor which has to be borne in mind is that admittedly, initially the said shop was leased out to Plaintiff's brother Narayan Godumal Nagdevani by the BMC.

10. Keeping in mind the above admitted factual position we have to consider controversy in question and find out whether the order passed by the learned Trial Judge is legal and correct.

11. First and foremost thing which has to be noted is that defendant is claiming right in respect of the suit property right from the year 1992. It is based on agreement for sale dated 21/12/1992 executed by Plaintiff's brother Narayan Godumal Nagdevani, original tenant. From the perusal of the said agreement it does appear that the defendant has in fact paid an amount of Rs.1,00,000/- to the original tenant Narayan Godumal Nagdevani and the present defendant was put in possession of this said shop which was in possession of Narayan Godumal Nagdevani. In clause-5 of the said agreement it is clearly mentioned that possession of the said shop is handed over to the defendant. Admittedly, at no point of time, Narayan Godumal Nagdevani was having two shops on plot No.53 but he was having only one shop and now the present Plaintiff and defendant both are claiming right in respect of that very shop. So, in the absence of any specific evidence adduced by the Plaintiff to show that the agreement in question dated 21/12/1992 is sham or bogus or that it was obtained by fraud etc. due weithage shall have to be given to the said agreement and the fact that defendant was put in possession of the said property under the said agreement. Incidentally, it must also be noted that even according to Plaintiff, he obtained No

objection of Narayan Godumal Nagdevani in the year 1996 i.e. subsequent to defendant's agreement. Moreover, there is no specific document placed on record by the Plaintiff to show that under particular document, suit premises were given by Narayan Godumal Nagdevani to him. So, before accepting the Plaintiff's case in that behalf Plaintiff must prima facie show that the earlier agreement dated 25/12/1992 was not executed. But prima facie Plaintiff has failed to point out any material which would dislodge the agreement dated 25/12/1992.

12. It is true that in the earlier proceedings which was filed by the present defendant against Plaintiff i.e. suit No.5391 of 1998 it was observed that the present defendant is not concerned with Shop No.14 and Corporation was directed to consider the case of present Plaintiff regarding transfer of Shop No.4 in his favour. It must be noted that in that suit the aspect as to whether there were in fact two different shops on which parties to the said suit were laying a claim was not considered extensively. However, now admittedly, so far as Shop No.4 is concerned the same is owned by one Chavan and present dispute is not at all in respect of the said Shop. Under the circumstance, decision in the above mentioned earlier

suit namely L.C.Suit No.5391 of 1998 will not come in the way of present defendant.

13. Mere production of the xerox copies of the rent receipts, licenses are also not sufficient to prove as to who is in actual possession of the property in question. In fact, in order to find out as to who is in actual possession the Trial Court had appointed Advocate Mr.Thorat as Court Commissioner and when he visited the suit shop it was found that present defendant and his brother were sitting inside the said shop while Plaintiff was standing outside the shop. It is also very clear from the Commissioner's report dated 10/11/2005 that some of the documents pertaining to defendant's business were found at the said shop. Merely because, some glass pieces were found in the said shop and Plaintiff is having business of glass we can not jump to the conclusion that finding of two pieces of glass at the said place are prima facie sufficient to establish Plaintiff's possession. We can not ignore the fact that admittedly, at the time of commission work it was noticed that some repairs and renovation work of the suit shop was going on. So, from the Commissioner's report dated 10/11/2005 it appears that defendant was in fact in possession of the suit

shop. A feeble attempt has been made on behalf of the Plaintiff to show that few days prior to the said event on the basis of the complaint lodged by the present defendant, plaintiff and his wife were arrested. According to Plaintiff, at that time, he had locked the suit premises and handed over the keys of the same to the Police. It is further alleged that the defendant in connivance with Police secured possession after obtaining keys from the Police. However, it must be noted that Plaintiff has not produced any material to show that he had locked the suit premises and handed over the keys to the Police. Besides this, if normally, this would have happened then the Plaintiff would not have kept mum. So, at this stage, I am not inclined to accept Plaintiff's case in this behalf.

14. There is another very important piece of evidence. It has come on record that when the Corporation Officer was carrying out inquiry, even at that stage, the present Plaintiff had submitted that large portion of the suit shop is in possession of present defendant while smaller portion is in his possession. This was in the year 2004 i.e. much prior to the filing of the present suit. So, we find that even the Plaintiff has admitted in previous proceedings

that defendant is in possession of the suit shop and in any event Plaintiff was not in exclusive possession of the suit shop. However, it appears that Plaintiff suppressed all these material facts and he came out with a case that he is in exclusive possession of the suit shop. So, under the circumstances, the learned Trial Judge rightly held that Plaintiff has prima facie failed to show his exclusive possession of the suit shop and the balance of convenience is not in his favour. He, therefore, rightly rejected Plaintiff's Notice of Motion.

15. Even after dismissing the Notice of Motion, the learned Trial Judge has issued direction to the Commissioner to remove lock and seal of the suit premises which was placed by the Commissioner as per the instructions of the Court. The learned Trial Judge further observed that “parties are free to occupy their respective portion in the suit premises viz. larger portion by the defendant”. It must be noted that there is nothing in the order to show as to what is meant by larger portion, what is the extent of the same. There is nothing in the order from which one can identify the larger portion and smaller portion. So, when such is the position, how the parties can implement the said

order. On the contrary, if they try to implement the order it would create further dispute between the parties and it would give rise to further complications and multiplicity of proceedings. So, instead of saying that parties are free to occupy their respective portion in the suit premises the Court out to have said that the Court Commissioner to remove the seal and restore the position which was noticed by the Court Commissioner for the first time when he went to the suit shop and as per that position, the defendant was actually found in physical possession or occupation of the suit shop.

16. Incidentally, it must be noted that though Plaintiff's Notice of Motion was dismissed by the learned Trial Judge Plaintiff has not at all filed appeal against the said order or has not even preferred cross-objection in the present appeal. As against this, though, it was observed by the learned Trial Judge that defendant is free to occupy larger portion of the suit shop being aggrieved by such observations the defendant filed the present appeal.

17. So, considering all the facts and circumstances, I think that it is necessary to modify

the order passed by the learned Trial Judge to some extent, so as to protect the interest of both the parties and to preserve the property till the final disposal of the suit. Hence, I pass the following order:-

O R D E R

Appeal is partly allowed.

Order passed by the Judge City Civil Court Bombay on 01/03/2007 dismissing Notice of Motion No.4357 of 2005 is confirmed.

The Trial Court Registrar is directed to open lock and seal of the suit shop and restore the position of the suit shop, noticed by the Commissioner when he visited the suit shop on 10/11/2005.

Both the parties to the suit are directed not to create third party interest in any manner in respect of the suit shop till the disposal of the suit.

The Trial Court is directed to dispose of the suit on merits according to law, without getting influenced by the observations made in this order, as expeditiously as possible and in any event within 6 months from today.

Under the circumstances of the case, parties to bear their own costs of this appeal.

(S.R.SATHE,J.)